Court of Queen's Bench of Alberta

Citation: Communications, Energy and Paperworkers Union, Local 707 v Suncor Energy Inc., 2012 ABQB 627

Date:
Docket: 1203 14853
Registry: Edmonton

Between:

Communications, Energy and Paperworkers Union, Local 707

Applicant

- and -

Suncor Energy Inc.

Respondent

Memorandum of Judgment
of the
Honourable Mr. Justice Eric F. Macklin

I. Introduction

[1] By letter dated June 20, 2012, the Respondent advised its employees that it will be introducing a new drug and alcohol testing policy on October 15, 2012. Pursuant to that policy, the Respondent will be imposing random drug and alcohol testing on the Applicant's members working in "safety-sensitive" or "specified" positions.

[2] The Applicant brings an application for an interim injunction prohibiting the Respondent from implementing the random drug and alcohol testing policy until a labour Arbitration Board renders a decision on the Applicant's grievance relating to that policy.

[3] The Applicant relies upon two affidavits sworn by its president, Roland Lefort, and filed on October 4 and 10, 2012 respectively. It also relies on affidavits of two of its members, Brenda Sitko and Catherine Canning, filed on October 9, 2012. The Respondent relies on the affidavit sworn by one of its vice-presidents, Anne Marie Toutant, filed on October 9, 2012. The parties filed transcripts of the questioning on affidavits as well as extensive briefs and authorities on October 11, 2012. The Respondent intends to begin implementing the new policy on October 15, 2012.

[4] The Union has signed an undertaking for damages should the injunction be granted.

II. Background Facts

[5] The Respondent Suncor Energy Inc. ("Suncor") is an integrated energy company conducting significant operations in the Athabasca oil sands near Fort McMurray, Alberta.

[6] The Applicant Communications, Energy and Paperworkers Union of Canada, Local 707 ("the Union") represents workers in Alberta who are employed by Suncor. It represents its members during collective bargaining of the terms and conditions of their employment, during grievance arbitrations, in judicial reviews of labour arbitration decisions, and in various workplace issues as they arise.

[7] Pursuant to the *Labour Relations Code*, RSA 2000, c. L-1, the Alberta Labour Relations Board issued a bargaining certificate to the Union with respect to certain Suncor employees. Under s. 40 of the *Code*, the Union "has exclusive authority to bargain collectively on behalf of the employees in the unit for which it is certified and to bind them by a collective agreement".

[8] The Union and Suncor are parties to a collective agreement which expires on May 1, 2013.

[9] The Union represents approximately 3,400 employees working at the oil sands operation of Suncor. The Suncor worksite is in operation 365 days a year, 24 hours a day.

[10] Most Union members employed at Suncor work 12-hour shifts and work 6 shifts and then have 6 days off.

[11] There are a similar number of contractor's employees on the Suncor site.

[12] On October 1, 2003, Suncor implemented a drug and alcohol policy which included provisions for post incident testing for alcohol and drugs. On October 3, 2003, the Union filed a policy grievance alleging that the policy, including the use of post incident testing, was unreasonable.

[13] The 2003 grievance was heard by an Arbitration Board. The hearing took 17 days with the arbitration board receiving the evidence of 26 witnesses and considering over 90 exhibits.

[14] On September 3, 2008, the Arbitration Board upheld the grievance as it related to Suncor's post incident testing policy and found portions of that policy to be unreasonable ("the 2008 Decision"). In its decision, the board stated that:

> The importance of safety at Suncor's worksite cannot be overstated. The Arbitration Board is unanimous that neither alcohol nor drugs, nor their effects, have any place in or about the worksite.
>
> (***Communications, Energy and Paperworkers Union, Local 707 v Suncor Energy Inc. (Alcohol and Drug Policy Grievance)***, [2008] A.G.A.A. No. 55)

[15] Nevertheless, the Board concluded that the procedures for post incident testing required amendment in order to ensure that the onus was on Suncor supervisors/managers to find evidence to justify post incident testing. In particular, the right to privacy protected employees from alcohol and drug testing unless there were reasons to justify a test. The board recognized the psychological trauma that may be caused to an employee by an invasion of privacy but that if there was a justifiable reason for conducting the test, while the test may still be a traumatic experience, the person tested would be better able to understand why the test was conducted and better able to accept the need for the test even if it is negative (2008 Decision at para. 87).

[16] By letter dated June 20, 2012, Suncor told its employees that it will be introducing a new drug and alcohol testing policy on October 15, 2012 ("the New Policy"). The New Policy imposes random drug and alcohol testing on all Union members working in "safety-sensitive" or "specified" positions. Mr. Lefort deposes that he has been told by Suncor management that it considers 85% of Union members to be working in such positions. In the Random Testing Standard developed by Suncor on June 20, 2012, Suncor indicates that "the random testing selection program will test a minimum of 50% of the Candidates every calendar year". (Affidavit of Anne Marie Toutant, Exhibit W, clause 3(c).) This would result in the random testing of approximately 1,445 Union members each year.

[17] Suncor intends to implement the same drug and alcohol testing policy on contractors and their employees on January 1, 2013.

[18] On July 19, 2012, the Union filed a grievance with respect to the New Policy. It asserts that the policy is contrary to the collective agreement, contrary to the common law, contrary to the *Personal Information Protection Act*, SA 2003, c. P-6.5 and contrary to the *Alberta Human Rights Act*, RSA. 2000, c. A-25.5. The Union seeks a direction that the employer not implement the New Policy.

[19] Correspondence exchanged between the Union and Suncor between September 10 and October 5, 2012 indicate that both parties are desirous of an early arbitration. While the parties have not agreed on an arbitrator, each party has provided a nominee to the board of arbitration. The parties are available to proceed with the arbitration prior to the end of November 2012.

[20] The sole issue is whether the Union should be granted injunctive relief such that Suncor is prohibited from conducting random drug and alcohol testing pending a decision by an arbitration board as to the reasonableness of the New Policy.

III. Analysis

[21] There is no doubt that much of the work at the Suncor plant involves the use of heavy equipment which is not only dangerous for the users of that equipment but also for those nearby. It is an inherently dangerous workplace and the risk of injury or death is high. Evidence from Suncor includes statistics showing that three fatalities at its plant out of the seven that have occurred since 2000 involved workers who died while under the influence of alcohol or drugs. Further, statistics from Suncor establish that between May 28, 2010 and June 30, 2012, there were over 100 reported security incidents involving alcohol or drugs at its operations. The records clearly indicate ongoing problems with alcohol and drug use among its workforce.

[22] While the Union argues that these statistics include contractors who are not Union members, and therefore do not form a proper basis for implementing a policy of random drug and alcohol testing, I believe it would be naive to think that none of the incidents involved Union members. Drug and alcohol use by all workers, Union members or contractors, is a legitimate concern for Suncor.

[23] I am also satisfied that Suncor's purpose for implementing the new policy is to address and minimize risks associated with the use of alcohol and drugs in the workplace. In short, and as stated by the arbitration board in its decision of September 3, 2008, "the importance of safety at Suncor's worksite cannot be overstated". Indeed, the importance of safety at Suncor's oil sands operation is readily and properly acknowledged by the Union.

[24] Notwithstanding the need to ensure a safe work environment for employees and the obligation to minimize risks to both the employees and the surrounding environment, there has been general recognition in the jurisprudence that drug and alcohol testing of employees can constitute a significant infringement of their personal privacy, dignity and bodily integrity. The affidavits of Brenda Sitko and Catherine Canning evidence the impact on their privacy as well as the humiliation and degradation they experienced when subjected to alcohol and drug testing following incidents that occurred at the workplace. The tests were negative for both women.

[25] In order to succeed in an application for an interim injunction, the Union must establish the following:

1. there is a serious issue to be tried;
2. irreparable harm will result if an interim injunction is not granted and the Union is ultimately successful in its grievance;
3. the balance of convenience favours granting the injunction.

(***RJR-MacDonald Inc. v Canada (Attorney General)***, [1994] 1 SCR 311)

[26] I would assess the three factors as follows.

1. serious issue to be tried

[27] There can be no doubt that the safety of individuals at a workplace is of paramount importance for Suncor and all employers and is something the Court must consider in determining the appropriate relief.

[28] Courts have often said, however, that the importance of workplace safety must also be tempered with a consideration for the privacy, bodily integrity and dignity of employees and, particularly, employees innocent of any wrongdoing. An employer's policy must achieve a balance between the employer's interests and the employee's rights. In determining whether the proper balance has been struck in any case, labour arbitrators and Courts must consider whether the policy sought to be implemented by the employer is reasonable. A reasonable policy should balance the business and safety concerns of the employer with the privacy, dignity and bodily integrity interests of the employee.

[29] There are a number of case examples where random drug and alcohol testing has been found to be reasonable and a *bona fide* occupational requirement (see for example ***Alberta (Human Rights & Citizenship Commission) v Elizabeth Metis Settlement***, 2003 ABQB 342). There are also case examples where random drug testing policies for employees in safety-sensitive positions were held to be invalid. (See for example ***CEPU Local 143 v Goodyear Canada Inc.***, [2007] JQ No 13701 (Que CA), ***Imperial Oil Ltd v Communications, Energy and Paperworkers Union of Canada, Local 900***, 2009 ONCA 420, 96 OR (3d) 668).

[30] I also note the 2008 Decision of the Arbitration Board wherein it was held that Suncor's original post incident drug and alcohol testing policy was overbroad in that even an accident or potentially dangerous incident, without more, "is not, of itself, sufficient reason to breach an employee's right to privacy" (at para. 92). This related to the attempted imposition of a policy by Suncor requiring those employees involved in an incident to undergo drug and alcohol testing. The Board confirmed that the "right to privacy protects employees from alcohol and drug testing unless there are reasons to justify a test" (at para. 92).

[31] On December 7, 2012, the Supreme Court of Canada is scheduled to hear an appeal from the New Brunswick Court of Appeal in the case of ***Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp and Paper Limited***. In that case, the employer, Irving,

adopted a workplace policy in 2006 which included mandatory random alcohol testing for employees in safety-sensitive positions. The Union filed a policy grievance challenging the reasonableness of the policy. An arbitration board determined that Irving failed to establish a need for the policy as it failed to demonstrate that the operations posed a risk of harm that outweighed an employee's right to privacy. While the board concluded that the workplace was a "dangerous work environment", it did not fall within the "ultra dangerous" category such as a nuclear plant or an airline. The Court of Queen's Bench allowed an application for judicial review and quashed the arbitration decision holding that it was unreasonable to require evidence demonstrating a history of alcohol abuse in the workplace once the Board concluded that it was a dangerous workplace. The Court of Appeal reversed the Queen's Bench decision on the issue of the standard of review and applied a correctness standard but otherwise dismissed the appeal.

[32] The fact that the Supreme Court of Canada has granted leave to hear an appeal relating to the imposition of a policy of random alcohol testing in an inherently dangerous unionized workplace also suggests that there is a serious issue to be tried in this case. While the Court of Appeal upheld the finding that random alcohol testing was reasonable and the decision of the Supreme Court of Canada may turn on the standard of review, it may also consider whether an employer is required to establish reasonable cause before it can impose a policy of random alcohol testing in an inherently dangerous unionized workplace.

[33] I am satisfied that there is a serious issue to be tried in this case. Therefore, the Court must balance the relative risks of granting or denying an injunction before a full hearing before an arbitrator of the dispute on its merits.

2. irreparable harm

[34] As indicated above, Courts have often considered drug and alcohol testing to constitute a breach of the privacy, dignity and bodily integrity of the individual being tested. In some cases, such an infringement may be capable of being adequately remedied by an award of damages. In other cases it may not. In these latter cases, the harm may be irreparable. Ms. Sitko and Ms. Canning have testified to the effect of testing on each of them and the resulting humiliation and degradation each felt.

[35] It is also important to note that random drug and alcohol testing may, in fact, do little to detect employees who pose a safety risk in the workplace. While there are a significant number of employees working in safety-sensitive positions at the Suncor workplace, random testing itself may do little to detect those employees who pose a significant safety risk. While the threat of random testing may be sufficient to reduce the risk, there is insufficient evidence before me that such is the case. Again, Suncor is not seeking to test on the basis of reasonable grounds to believe that a person may be under the influence of alcohol or drugs, but rather to simply randomly test any employee.

[36] It should also be noted that while the policy contemplates that approximately 1,445 Union members would be randomly tested annually, there is a substantial likelihood that many individuals will be tested more than once. The Random Testing Standard also provides in clause 3(d) that "once a Candidate has been selected and tested their name will be immediately returned to the Pool. For greater certainty, a Candidate may be randomly selected for testing multiple times in any given year".

[37] Suncor says that any harm occasioned to employees would not be "new harm" nor "substantial" because they are already subject to "alcohol and drug testing through pre-employment, post incident reasonable cause and periodic unannounced testing as part of a return to work program". In my view, this statement does not address the majority of employees who have been continuously employed (including those who were subject to pre-employment testing when not yet employed or a Union member), have no history of involvement in any incident and are not in a return to work program after a period of leave for alcohol or drug related concerns. Those employees will now be subject to invasive testing procedures such as the taking of breath or bodily fluids, and are the ones who may be irreparably harmed if it is ultimately determined that the New Policy is unreasonable.

[38] Given the impact on the innocent employees' privacy, dignity and bodily integrity, and the possibility that such an infringement could not capably be remedied, it is my view that the non consensual seizure of bodily fluids from innocent employees may cause irreparable harm if an injunction is not granted and the Union is ultimately successful before the arbitration board.

3. balance of convenience

[39] The Suncor plant has been in operation for many years. In her affidavit, Ms. Toutant swears that "for at least the last 12 years, the use of alcohol and drugs by persons who work at Suncor's oil sands operation has been a significant safety concern for Suncor" (at para. 71). In October 2003, Suncor revised its alcohol and drug policy which now includes provisions for reasonable grounds and post incident testing for alcohol and drugs. There was no attempt to include random testing prior to its announcement in June 2012 of a new alcohol and drug policy designed to include random testing for those in safety-sensitive positions, though Suncor says that it has been incrementally changing its policies to try and address ongoing concerns. Between 2003 and 2012, there are many incidents of alcohol and drug use and the various safety meetings, educational programs, and presentations that Suncor has put in place in an attempt to minimize and reduce the number of such incidents. It has also provided professional assistance and rehabilitation programs for employees with alcohol and drug related problems.

[40] In short, Suncor has taken a considerable period of time and undertaken a number of alternative related measures before attempting to implement such a policy notwithstanding evidence that may have justified an attempt to impose such a policy at a much earlier date.

[41] There is no doubt that safety is a paramount concern for Suncor. However, it would seem that a temporary delay in imposing random testing, if an arbitration board finds in Suncor's favour, would not be a great inconvenience to it. Further, Suncor delayed the implementation of the same policy for contractors and their employees until January 1, 2013.

[42] Furthermore, the Applicant has appropriately engaged the grievance process in a timely manner in order to obtain a determination as to the validity of the policy which will constitute a significant change to the workplace environment. The Applicant enjoys a right to privacy and bodily integrity. The grievance process will involve an assessment of Suncor's justification and evidentiary foundation for breaching the Applicant's rights through the random testing requirement.

[43] The balance of convenience, in my view, favours the Union members in this case as the employees would be subject to random testing beginning on October 15, 2012, three days from the date of this application.

IV. Conclusion

[44] The application by the Union for an interim injunction is hereby granted.

[45] However, it is my view that the grievance must be considered as soon as possible by an arbitration board. If the New Policy is found to be reasonable, then the safety of the workplace, all of its employees and the environment mandate that the New Policy be implemented as soon as possible. Alternatively, if the New Policy is found to be unreasonable, then Suncor must know that as soon as possible so as to take whatever other steps it feels necessary to ensure and enhance workplace safety.

[46] Dates by which an arbitration hearing must be held will be set by me, as well as any other issues relating to the early scheduling of an arbitration, if the parties cannot agree.

Heard on the 12th day of October 2012.
Delivered orally on the 12th day of October 2012.
Dated at the City of Edmonton, Alberta this 12th day of October 2012.

Eric F. Macklin
J.C.Q.B.A.

Appearances:

Ritu Khullar
David Williams
Chivers Carpenter
for the Applicant

Barbara Johnston
Joseph Hunder
Fraser Milner Casgrain
for the Respondent